Supreme Court, U.S.
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04-52 OCT 15 2004

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NO.

IN THE
# SUPREME COURT OF THE UNITED STATES

John R. Wyss, et al.,
*Petitioners,*

v.

City of Hoquiam, et al.,
*Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT NO: 04-35020
D.C. No. CV-02-05529-JKA

## PETITION FOR A WRIT OF CERTIORARI

John R. Wyss
Petitioner
23005 107th Pl. W.
Edmonds, WA 98020
(206) 469-0777

## Questions Presented:

The United States Court of Appeals for the Ninth Circuit has held that city legitimately exercised police power in disconnecting utilities and forcing Wyss from a home prior to a scheduled hearing, resulting in deprivation of Wyss's home by premature execution of its order. This raises three important federal questions that warrant review from this Court:

1. Whether United States Constitution requires cities to provide homeowner an opportunity for hearing prior to seizure of a home, except if acting properly under a warrant or a specific code or statute, or in a clear case of emergency?

2. Whether **"1997 Uniform Code for the Abatement of Dangerous Buildings"** limit city exercise of police power under that Code's **§403.1, §404, §501.1 and §504,** regarding due process in owner's appeal and hearing, when a timely appeal is filed, unless an emergency exists or immediate need is stated in "notice and order", and the alternate 10-day shortened appeal is granted to homeowner to expedite due process?

3. Whether decision below permits city to use standardless, arbitrary and selective or capricious methods to designate and to abate a home, and violates the Due Process Clause, the

Equal Protection Clause, and homeowner's United States Constitutional rights under and Amendments IV, V or XIV?

**Parties to the Proceeding:**

The following individuals and entities are parties in the court below:

John R. Wyss, as an individual and a homeowner; James Russell Beamer Wyss, a minor son of John R. Wyss, (Petitioners);

City of Hoquiam, a Municipal Corporation; the City of Hoquiam Department Of Public Works; Sue Vasey Mollett, as Hoquiam Building Official; Orlando Howell, as Hoquiam Code Enforcement Officer; John Does 1-10, employees or agents of the City of Hoquiam; Grays Harbor PUD, a Municipal Corporation; John Hoder, as employee or agent of Grays Harbor PUD; John Does 11 through 20, employees or agents of Grays Harbor PUD, (Respondents).

## Table of Contents

**Questions Presented**..... Pg. i
**Parties to the Proceeding**.....Pg. ii
**Table of Contents**.....Pg.iii
**Table Of Cited Authorities**.....pg.iv
**CONTENTS OF APPENDIX(UNDER SEPARATE COVER)**.....pg vi
**Opinions Below**.....Pg. 1
**Jurisdiction**.....Pg. 2
**Constitutional Provisions and Statutes Involved**..... Pg. 3
**Statement of the Case**..... Pg. 5
A. Factual Background
B. Proceedings in the Washington Courts
C. Proceedings In The District Court Western United States District Court No. CV-02-05529-JKA
D. Proceedings On Appeal Case No: 04-35020, Ninth Circuit Court of Appeals
**Reasons For Granting the Writ** .....**pg. 11**
I. Review Is Warranted Because The Questions Are Of High Public Importance In Order To Establish Due Process Rights Of Homeowners Under City Abatement Codes
II. Review Is Warranted Because The Dismissals Below Of Petitioner's 42 § 1983 Claims Conflict With Decisions Of This And Other Courts
III. Review Is Warranted Because No Court Has Analyzed The Unlawful Acts Of Officials In Light Of

City Code Pertaining To Any "Dangerous Buildings".

**Conclusion**.....**pg 27.**

## TABLE OF AUTHORITIES

### CASES

Branyon v. Kirk, 101 So. 345, 349, 238 Ala. 321. ..... 20

City of Minot v. Freelander, 426 NW2d 556, ND 1988..... 19

Conner v. City of Santa Anna, 897 F.2d 1487, 1493 (9th Cir. 1990) ..... 10, 15

Corbin v Hayes, 244 Ky 33, 50 SW2d 31..... 19

Diruzza v. County of Tahama, 206 F.3d 1304 (9thCir. 2000) ..... 25

Flatford et al v. City of Monroe, et al, 794 F. Supp. 227; (1992)..... 11

Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Circuit 2001)(en banc), cert. Denied, 534 U.S. 817 (2001)..... 16

Fuentes v. Shevin, 407 U.S. 67 (1972) ..... 3, 18

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 18

Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)..... 26

Leppo v. Petaluma, 20 Cal. App. 3d 711 ..... 13

McMahon v. Telluride, 79 Colo 281, 244 P. 1017 ..... 12

Miles v. District of Columbia, 354 F. Supp. 577..... 13

Monroe v. Pape, 365 U.S. 167, (1961) ..... 3, 27

Parratt v. Taylor, 451 U.S. 527 (1981) ..... 17

Payton v. New York, 445 U.S. 573, 590 (1980)..... 3

Romero v. Kitsap County, 931 F. 2d 624, 627 (9th Cir. 1991) ..... 26

Roper v. Winner, 244 SW2d 355, Tex. Civ. App..... 19

Silverman v. United States, 365 U.S. 505.,..... 3

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).... 18

Soldal V. Cook County, 506 U.S. 56 (1992) ..... 3, 11

Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1318 (9th Cir. 1989) ..... 10, 14
Thornton v. Chase, 175 Misc 748, 23 NYS2d 735 ..... 19
Tribble v. Gardner, 860 F. 2d 321, 324 (9thCir. 2000) ..... 26
United States v. Karo, 468 U.S. 705, 714 -715 (1984); ..... 3
Wyss v City of Hoquiam, 147 Wash.2d 1025 (2002) ..... 2

**STATUTES**

42 U.S.C.A. § 1983 ..... 4, 15, 27
Revised Code of Washington, RCW 36.70C.030 ..... 5

**OTHER AUTHORITIES**

McQuillin's The Law Of Municipal Corporations (3rd Ed) - § 24.560.-"Vacation" ..... 18

**REGULATIONS**

1997 Uniform Code for the Abatement of Dangerous Buildings. §403.1, §404, §501.1 and §504 ..... passim

Hoquiam's City Code Chapter 2.22, Dangerous Buildings, section 2.22.010.. ..... passim

**CONSTITUTIONAL PROVISIONS**

U.S. Constitution Amendment IV ..... 3
U.S. Constitution: Amendment V ..... 3
U.S. Constitution Amendment XIV..... 4

**CONTENTS OF APPENDIX**
**(UNDER SEPARATE COVER)**
**PROVIDED PER RULE 14.1(i):**

1)Case No. CV-02-05529-JKA- United States District Court- (ORDER)

2)Case No: 04-35020, Ninth Circuit Court of Appeals- (Memorandum and Judgment)

3)Hoquiam City Code Chapter 2.22, Dangerous Buildings, section 2.22.010

4) 1997 Uniform Code for the Abatement of Dangerous Buildings; §403.1; §404; §501.1 and §504.

5) Revised Code of Washington, RCW 36.70C.030

6) McQuillin's The Law Of Municipal Corporations(3rd Ed)-§24.560.-"Vacation"

**PETITION FOR A WRIT OF CERTIORARI**

Petitioner John R. Wyss, owner of a home in the city of Hoquiam, Washington, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court Of Appeals For The Ninth Circuit in this case. In violation of the requirements of Hoquiam City Code, while awaiting a scheduled hearing by the city Board of Appeals as required, Hoquiam abused its police power by forcing petitioner from his home, not giving the opportunity to first be heard on a city matter alleging building code violations. By definition, the "Building Code" implies a collection of laws. The published statutes governing "Dangerous Buildings" are arranged in a systematic manner. Codes are to be taken literally as law. Enforcement of a non-emergency city agenda was standardless, arbitrary and selective, and on whim of a single official, not a Board of Appeals, as dictated by Building Code.

This Court's decision on a homeowner's right to an opportunity to be heard prior to loss of protected rights is of federal importance, as it relates to the rights of homeowners.

**Opinions Below:**

United States Court Of Appeals For The Ninth Circuit, Case No. 35020;

Western United States District Court Case No. CV-02-05529, The Honorable J. Kelly Arnold;

Other related opinion;

Court Of Appeals Of The State Of Washington, Wyss v City of Hoquiam, 147 Wash.2d 1025 (2002);

**Jurisdiction:**

The decision of the United States Court Of Appeals For The Ninth Circuit was entered on July 21, 2004. The decision below is final for the purposes of this court's jurisdiction under 28 U.S.C. § 1254, federal Court Of Appeals having rendered judgment. This Petition is filed within 90 days of that judgment. Based upon the fact that Hoquiam did not adhere to ordinance, thus due process standards of its Building Code, did not give appropriate rights to the homeowner.

Hoquiam's adopted code in the abatement of any so-called "dangerous buildings" is the "1997 Uniform Code for the Abatement of Dangerous Buildings.".

Petitioner recognizes that this Court will grant certiorari only in cases of compelling need. For the reasons above and discussed in more detail below, this Court's intervention is warranted in order to ensure that a homeowner's rights, and his equal protection the under law is respected. Jurisdictions

adopting codes must provide due process to property owners, and not skirt lawful procedure to advance selective agenda.

The vast number of property owners effected demonstrates that this case presents questions of similar seizure and due process factors in which the Court has granted certiorari before. See, e.g., Soldal V. Cook County, 506 U.S. 56 (1992); Fuentes v. Shevin, 407 U.S. 67 (1972) United States v. Karo, 468 U.S. 705, 714 -715 (1984); Payton v. New York, 445 U.S. 573, 590 (1980). Silverman v. United States, 365 U.S. 505., Monroe v. Pape, 365 U.S. 167, (1961).

## Constitutional Provisions and Statutes Involved:

U.S. Constitution Amendment IV provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution: Amendment V provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment XIV provides: Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. § 1983 provides:
Every person who, under color of any statute, ordinance, regulations custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress.

Pursuant to this court's Rule 14.1 (f), the provisions of Hoquiam's Code and the adopted Uniform Code included in the Appendix per Rule 14.1(i) are:

1. Hoquiam's City Code Chapter 2.22, Dangerous Buildings, section 2.22.010, (adopting 1997 Uniform Code for the Abatement of Dangerous Buildings);

2. 1997 Uniform Code for the Abatement of Dangerous Buildings.

3. Revised Code of Washington, RCW 36.70C.030(1)(L.U.P.A., or the Land Use Petition Act)

**Statement of the Case:**

A. **Factual Background**

In August 1999, Hoquiam Building Official Sue Vasey issued to petitioner "notice and order" to vacate and demolish petitioner's home, together with letters given by Ray Pumphrey, Fire Official, and Jim Tobey, Health Department, describing the presence of minor code violations, falling far shy of emergency, or immediate danger. Probative evidence to that is reflected in the letters of the officials, given at the time. Note that the contents of these two letters do not in any form describe emergency, or

immediate danger at the home of Appellant. (See letters regarding 314 Lincoln inspections of Ray Pumphrey and Jim Tobey, of July, 1999).

Building Code to abate any so-called "dangerous buildings" is **1997 Uniform Code for the Abatement of Dangerous Buildings.** The "Notice and Order", ostensibly issued under the authority of this code, provided for 30 days in which to appeal and contest the findings and order therein, which was to vacate the home within 30 days and demolish. No option to repair the building or abate any present violations was afforded the homeowner in this "notice and order".

Within the 30 days provided, on September 29, 1999 Wyss submitted his appeal, contesting each stated violation.

October 5, 1999 city posted "Do Not Enter" and October 22, 1999 city had Grays Harbor P.U.D. cut wiring to the building. October 22 city also notified Wyss that his "hearing" was to be November 10, 1999, but later rescheduled it to December 1, 1999, leaving Wyss without his home or access to his personal property under penalty of law.

**1997 Uniform Code for the Abatement of Dangerous Buildings §403.1, §404 and §504** require the city to adhere to due process standards. City must provide homeowner a hearing by its "Board of Appeals" prior to enforcement of any "notice and order", if a timely appeal

has been filed, unless immediate need or emergency is stated in "notice", and the appeal period is shortened to 10 days.

Appellant appealed to the Building Code Council for a hearing, and contested the building official's order relating to code violations. City forced the homeowner out in October 1999, while he was awaiting a hearing on the matter, and then did not hear the matter until December 1999.

Hoquiam allowed and caused the property to further deteriorate from the elements after forcing Wyss from his home, contributing to its accusation of the home as "public nuisance". By vacating the home and disconnecting power in winter, other "expert declarations" made many months after disconnected power, vandals, vagrants, winter weather and forced vacancy of the homeowner took a significant toll upon the home. The home was not a "nuisance" at law or in fact, prior to Wyss being forced from his home without the assured prior hearing and opportunity to correct violations.

After the December 1, 1999 Building Code Council sent out a decision, Wyss, having been forced from his home, did not receive the final order until well after 30 days (the time allowed to submit to the final orders) and thus, no opportunity to correct the defects was provided to Wyss.

The provision of the Code to first provide hearing prior to "enforcement of

any order" is clearly designed to avoid breaches of due process such as this, and here, where the standards and provisions of the code are not followed by city, seizure and violations of due process provisions of a homeowner's United States Constitutional rights under Amendments IV, V or XIV occur, as they have here.

B. **Proceedings in the Washington Courts**

As to the State of Washington rulings, under RCW 36.70C or "L.U.P.A.", Wyss's request to have the city action reviewed by court was rejected due to a 21-day statute of limitations for the type of writ requested. Since city had forced Wyss from his home, the mailed order of the Board of Appeals did not reach him until well past the 21 days.

The mailing did not amount to a true opportunity to comply with the Board of Appeals: "process which is a mere gesture is not due process" Central Hanover Trust 339 U.S. 306. No findings on the merits were reached. From opinion in Wyss v City of Hoquiam, 147 Wash.2d 1025(2002):

> "Because Wyss's petition for review was properly dismissed as untimely, we do not reach the merits of whether the City's decision was proper. [FN7]: Although Wyss's appeal of the council's decision is untimely, his claim for damages is not because RCW 36.70C.030(1)(c) exempts claims for damages from

L.U.P.A.'s procedural requirements)" (infra, App. )

So, damages claimed are available.

**C.Proceedings In The District Court Western United States District Court No. CV-02-05529-JKA**

District Court issued "Order Granting Defendant's Summary Judgment" on November 21, 2003, dismissing all of Plaintiff/Petitioner's claims for damages against Defendants in an 11-page order. See Appendix.

Of particular note in that Order is Page 2, lines 21-28:

> "Plaintiff was forced out of the building when the City declared that the building was unsafe and dangerous".

It should be noted that facts show that Wyss was "forced out". That action occurred from October 5, 1999 to October 22, 1999, long before a hearing was provided Wyss December 1, 1999.

Also of note are facts provided in District Court Order at Page 6, lines 12-24, proving that the city invoked an adopted Code, the 1997 Code for the Abatement of Dangerous Buildings, and provided a 30 day appeal period. Section 501.1 provides that if immediate need may dictate immediate vacation, the appeal would receive an expedited due process hearing and, as such is to be filed within a 10-day window.

Such a need for immediate action was not required or disclosed by "notice and order", yet, Hoquiam enforced vacation of the building by disconnection of Wyss's utilities on October 22, 1999, well ahead of hearing provided December 1, 1999 (Page 9, line 26 to Page 10, line 11).

**D. Proceedings On Appeal, Case No: 04-35020, Ninth Circuit Court of Appeals**

Court issued "Memorandum" on July 21, 2004, affirming District Courts dismissal of Plaintiff/Petitioner's claims for damages against Defendants. This is a 4-page document, and appears in the Appendix, a-. A request for Rehearing was submitted late by Petitioner, and rejected. Judgment was filed and entered July 21, 2004.

Of note, and believed to be in error in "Memorandum" are particular case law citations. At Page 3, lines 4-11, a comparison of city's exercise of police power to that in the case of Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1318 (9th Cir. 1989) is drawn. At Page 3, lines 17-19, comparison to seizure of autos in Conner v. City of Santa Anna, 897 F.2d 1487, 1493 (9th Cir. 1990).

The Court of Appeals states that "Multiple expert declarations in the record clearly demonstrate Wyss's home was a nuisance..." (Page 3, lines 1-3).

The said declarations were provided long after deterioration as a result of the city's actions that elevated the

conditions present when Fire and Health officials Toby and Pumphrey wrote their initial reports in July 1999.

City claims that due to "public nuisance" a hearing did not need to be given prior to Wyss's deprivation.

**Reasons For Granting the Writ:**

**I. Review Is Warranted Because The Questions Are Of High Public Importance In Order To Establish Due Process Rights Of Homeowners Under City Abatement Codes**

Appellant John R. Wyss, appearing pro se, presents this petition as a homeowner of means that does not allow retention of counsel for this purpose. For the typical homeowner in America, a home represents not only a property interest, but an interest in one's life and liberty, as well, thereby invoking Constitutional protections. Flatford et al v. City of Monroe, et al, 794 F. Supp. 227; (1992); Soldal V. Cook County, 506 U.S. 56 (1992).

As this Court is aware, complex litigation against a city supported financially in its legal defense by a Cities Insurance Authority represents a serious threat to equal protection under the law for homeowners and their rights, as they exist under city statutes, when cities adopt Abatement Code of the type discussed herein, then do not adhere.

In all, 48 States and 9,000+ varied jurisdictions including Washington, D.C., Puerto Rico and the Department of Defense and the National Park Service have adopted or are in the process of adopting one or more of International Code Council's Codes, author and publisher of code adopted now by Hoquiam as code, the "1997 Uniform Code for the Abatement of Dangerous Buildings".

Homeowners within jurisdictions that adopt the "Uniform Codes" have defined rights to appeal a "notice and order" of a building official PRIOR TO THE LOSS OF A CONSTITUTIONALLY PROTECTED RIGHT, except in cases, if immediate need requires, where the Code provides for expedited 10-day appeal. (§501.1, §504)

Under the Code, an opportunity for owner's appeal to an order to vacate or demolish must be heard by a "Board of Appeals".(§403.1) As a Board, they need to rule upon any alleged code violations, make its order to the owner, allow the owner time certain under Code to comply, and if the owner does not comply with the Board, the building may be demolished without the need to compensate "taking".

City claims of an "abatable nuisance" are not true, and conflict with two letters, from the only "experts" to weigh in prior to deprivation of Wyss's property, and city should be held liable for damages. McMahon v. Telluride, 79 Colo 281, 244 P. 1017.

The unauthorized use of police power is a valid cause of action. Leppo v. Petaluma, 20 Cal. App. 3d 711.

Vacating the property at a time when appellant was waiting for a scheduled hearing on his September 1999 appeal caused a deprivation, by premature execution of its order without "due process of law", Miles v. District of Columbia, 354 F. Supp. 577 and under "color of law", in violation of 42 U.S.C.A. 1983.

As perceived by the "Memorandum", denigration to the property caused by torts of the city now help it in defending against indefensible acts.

How can a "reasonable" use of a city's police power, relating to building code violations, not need follow statutes, and its own code relating to building code violations, as in the present case, when emergency or immediate need is not present?

> "The City exercised its police power in ordering Wyss's home vacated and the electricity disconnected" (Memorandum, pg 3, line 4-5)

Municipal Code of Hoquiam itself forbids action, once appeal to a charge of nuisance based upon "code violations" is "properly and timely filed", unless an emergency is present, and the emergency is clearly stated and posted. (Chapter 5, Sec. 504) None was, because none existed.

The building official had no statutory grounds without support from its Appeals Council for "its police power in ordering Wyss's home vacated and the electricity disconnected", (Chapter 4, Sec. 403) so the acts were not justifiable exercises of police power, but were purely arbitrary.

## II. Review Is Warranted Because The Dismissals Below Of Petitioner's 42 U.S.C.A. § 1983 Claims Conflict With Decisions Of This And Other Courts

There exists an apparent point of conflict with other decisions of the Court that were not addressed in the opinion.

Several material points of law are entirely overlooked in the decision, or are subjected to erroneous analysis.

For example, regarding case law citations contained in Memorandum filed July 21, 2004, please consider comparison to the case of Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1318 (9th Cir. 1989). Though similarity is drawn by the Court of Appeals here, it does not apply in Wyss v. Hoquiam, since as noted in its footnote n6:

> "n6 (excerpt) It is clear that once the decision to suspend the permit is made, *state law expressly provides for post-deprivation hearings.*"

> Cont……,"*The APCD's power to suspend permits immediately is necessitated by the state's interest in enforcing its pollution control laws. The California legislature has determined that swift administrative action may be necessary to protect the public health and safety from violations of the state's pollution control regulations.*" (italics added)

So, California statute provided for a post deprivation hearing in Soranno's., after a permit to pollute is suspended.

Just the opposite is true in Hoquiam, where the Building Code statute provides for an opportunity for hearing and ruling by its Board of Appeals prior to enforcement of any order. Therefore the case law does not support the finding of the Court of Appeals, but appears to support Wyss, since Hoquiam did not follow the regulations, as Morgan had in that California case of deprivation.

"Memorandum" at Page 3, lines 17-19, dismisses Wyss's seizure of "home and property" claim, and compares it to a seizure of autos in Conner v. City of Santa Anna, 897 F.2d 1487, 1493 (9th Cir. 1990).

That case law does not support the Court of Appeals finding because City of Santa Anna only removed automobiles from private property after "Santa Anna City

Council determined that the automobiles constituted a public nuisance". So, in Conner, a hearing of the Council was provided and determination then was made, then the Council order was enforced.

The Court of Appeals finding conflicts with the fact that Wyss did not receive a hearing until nearly two months after the trespass, damaging and taking of his home, with no legitimate reason for the deprivation. Hoquiam's arbitrary procedure violated Wyss's stated right to its Board of Appeals hearing, a determination and opportunity to comply before deprivation of protected rights.

Case law comparisons contained in District Court Order filed November 21, 2003, also fail.

Please consider comparison to the case of Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Circuit 2001)(en banc), cert. Denied, 534 U.S. 817 (2001).

At Page 5, lines 17-22, Judge Arnold points out that "a city may not arbitrarily enter abatement orders or declare the existence of nuisance with no underlying standards" at 652-653, yet points out at Page 5, line 28 to Page 6 line 4:

> Freeman v Dallas: "The court found that the City adhered to these standards and thus, the demolition of the apartment building did not violate the Fourth Amendment."

Since Hoquiam did not adhere to its codified and regulatory standards, the comparison is clearly defective.

From the landmark Parratt v. Taylor, 451 U.S. 527 (1981), in analyzing the need for and appropriateness of hearing before deprivation, where possible, Justice Blackmun, concurring, expands on the principle of "postdeprivation" remedies (which were found to be adequate in that case), and when they can apply in providing due process, and when they are inadequate:

> "Most importantly, I do not understand the Court to suggest that the provision of "postdeprivation remedies," ante, at 538, within a state system would cure the unconstitutional [451 U.S. 527, 546] nature of a state official's intentional act that deprives a person of property. While the "random and unauthorized" nature of negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," ante, at 541, it is rare that the same can be said of intentional acts by state employees. When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so. See Sniadach v.

Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). In the majority of such cases, the failure to provide adequate process prior to inflicting the harm would violate the Due Process Clause. The mere availability of a subsequent tort remedy before tribunals of the same authority that, through its employees, deliberately inflicted the harm complained of, might well not provide the due process of which the Fourteenth Amendment speaks."

**III. Review Is Warranted Because No Court Has Analyzed The Unlawful Acts Of Officials In Light Of City Code Pertaining To Any "Dangerous Buildings".**

City actions are not merely the "unauthorized" acts of officials as suggested in District Court's Opinion. The official actions are illegal under City Code. This was not addressed.

Hoquiam City Code 2.22.010 "Dangerous Buildings" states:

> 2.22.010 Uniform Code Adopted.
> "The Uniform Code For the Abatement of Dangerous Buildings, 1997 Edition is incorporated by reference and adopted as the uniform code for the

repair, vacation, or demolition of dangerous buildings in the city."

Eugene McQuillin's The Law Of Municipal Corporations(3rdEd)-§ 24.560.-"Vacation", cites numerous examples respecting rights of homeowners faced with municipal exercise of police powers to abate what the city considers "nuisance". It has often been held that specific city officials that are properly empowered may act within the standards of a narrowly defined statute to the limit they may, and their acts must be lawful:

> From MCQUILLAN'S:
> "it has been ruled that while a city has authority to close up buildings that are a public nuisance, a notice and a hearing (Thornton v. Chase, 175 Misc 748, 23 NYS2d 735) and an opportunity to correct the defect must be afforded the owner.(City of Minot v. Freelander, 426 NW2d 556, ND 1988, & Roper v. Winner, 244 SW2d 355, Tex. Civ. App.)
> "Thus, a municipality cannot by ordinance declare a particular building a nuisance, eject the occupants summarily and take charge of a building and its contents. (Corbin v Hayes, 244 Ky 33, 50 SW2d 31)."

Factors present at the home, even if they were code violations, (the so-called

"nuisance likely to seriously injure occupants or visitors") were not "abatable nuisance" without giving consideration to due process and the provisions of the Building Code:

> "An "abatable nuisance" cannot arise from the doing, in a proper manner, of that which is authorized by law." Branyon v. Kirk, 101 So. 345, 349, 238 Ala. 321.

Wyss was properly waiting for his scheduled hearing under Building Code statutes when the deprivation of his home and property occurred. Wyss had been working to prepare the building for total renovation by removing old surfaces and debris from the old building. None of the work had required permits, and a plan for renovation was underway, and Wyss, like many homeowners, intended to fix the home himself and produce a refurbished product when the job was completed, all legal action on the part of the homeowner. No emergency or unusual factors other than a need for typical repairs existed at the home at the time city forced Wyss out in October 1999, while the appeal was scheduled for December 1999.

A brief review of 1997 Uniform Code for the Abatement of Dangerous Buildings shows that Wyss's rights were disregarded in total.

The Code provided the right to a hearing by the Board of Appeals on his timely filed appeal to the building

official's "notice and order", and the Code provided the right to an opportunity to make any needed repairs prior to forcing Wyss from his home.

The violations cited in building official's August 30, 1999 notice and order carried an offered 30 days within which to appeal. Hoquiam accepted the timely filed appeal September 29, 1999, a hearing date was set, THEN, ex parte, Hoquiam forced out Wyss and had P.U.D. cut the electrical wiring.

If Hoquiam permitted 30 days within which to file the appeal, then it becomes obvious that at the time "immediate action" was not needed. In fact the Building Code makes a special provision for emergencies allowing only 10 days to appeal, thus shortening the process, if a "postdeprivation" hearing is warranted. This was not the case at the time "notice and order" was issued. By offering the longer 30-day appeal time, Hoquiam's order did not declare or acknowledge an immediate need or emergency. No such immediate need existed or was ever been alleged, at the time of the deprivation:

> **Section 501.1 Form of Appeal(7):** "*..if the building is in such condition as to make it immediately dangerous* to the life, limb, property or safety of the public or adjacent property and is ordered vacated and posted in accordance with Section 404, ***such appeal shall***

***be filed within 10 days*** from the date of service of the notice and order of the building official."

**Section 404.2 Compliance:**
"Whenever such notice is posted, the building official shall include a notification thereof in the notice and order issued under 401.2, *reciting the emergency* and specifying the conditions which necessitate the posting." *(italics added for emphasis)*

**Section 502- Effect of Failure to Appeal:**
"Failure to file an appeal in accordance with the provisions of Section 501 shall constitute a waiver of *the right to an administrative hearing and adjudication of the notice and order* or any portion thereof" (italics added).

After Wyss's deprivation of home and alienation of his property (not being allowed to re-enter his home), city officials, having caused greater damage to the property by cutting wires, shutting down all fans, heating and ventilation in October, allowed doors to be broken and property vandalized when vacant, then decided that it became expedient to declare that a huge safety hazard of some nebulous nature existed at

Wyss's home before, and thereby providing justification to those unlawful actions that were taken in forcing Wyss from his home without first the scheduled hearing.

An "abatable nuisance", in regards to its "Notice and Order" of August 30, 1999 could not exist without an Appeals Board ruling and an opportunity for the owner to comply therewith.

An "abatable nuisance" did not exist, and no emergency was present under circumstances that existed. This is supported by aforesaid two statements of July 1999 by Health Official Toby and Fire Official Pumphrey.

Wyss's deprivation did not follow an established procedure as specifically detailed in the Building Code.

City building official Vasey took the law into her own hands by writing a letter October 22, 1999 requesting that Grays Harbor P.U.D. cut wiring to the home while a scheduled hearing to Board of Appeals was pending. The willful acts violated Section 403, 1997 Uniform Code for Abatement of Dangerous Buildings:

> **Section 403- Repair, Vacation and Demolition**
>
> "The following standards shall be followed by the building official (***and by the Board of Appeals if an appeal is taken***) in ordering the repair, vacation or demolition of any dangerous building or structure:

"1. Any building declared a dangerous building under this code shall be made to comply with one of the following:

"A. The building shall be repaired in accordance with the current building code or other current code applicable to the type of substandard conditions requiring repair; or

"B. The building shall be demolished at the option of the building owner"

So, the city had adequate statutory safeguards in place to protect the public need for safety and nuisance abatement, but DID NOT FOLLOW STATUTES:

**Section 504- Staying Of Order Under Appeal,**

*"Except for vacation orders made pursuant to Section 404, enforcement of any notice and order of the building official issued under this code shall be stayed during the pendency of an appeal therefrom which is properly and timely filed."*

Under § 403.1, § 404 and § 504 1997 Uniform Code for Abatement of Dangerous Buildings, Hoquiam's adopted code, Building Official had no legal authority to engage in its premature enforcement actions, prior to the building owner's hearing upon his timely filed appeal of September 30, 1999 to the Hoquiam

Building Code Council (heard December 1, 1999, nearly two months after Wyss was forced from his home).

In *arguendo*, even if an overwhelming need for immediate action were needed, as shown by any real evidence available at the time, immediate or emergency actions along those lines are fully available under the code for "dangerous buildings", and were not taken. The petitioner was allowed to file an appeal within 30 days, not 10, as would have been required in the case of immediate need under **§501.1 Form of Appeal(7)**, and the required recitation of emergency under **§404.2 Compliance** is notably lacking from the building official's "notice and order".

It should be noted as circumstantial evidence, that in the prior 18 months of the petitioner's residency in the so-called "dangerous building" no accidents or injuries happened to any occupant or visitor, casting further doubt upon the legitimacy of any claim of "public need" to immediately abate.

From Diruzza v. County of Tahama, 206 F.3d 1304 (9thCir. 2000):

> "B. Qualified Immunity….Government officials who perform discretionary functions are entitled to qualified immunity only 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'

Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) This test necessitates a two part analysis: '(1) whether the law governing the official's conduct was clearly established, and (2) whether, given this clearly established standard, a reasonable official could believe that his or her conduct was lawful' Biggs v. Best, Best and Krieger, 189 F. 3d 989 (9thCir. 1999); see also Ortega v. O'Conner, 146 F. 3d 1149, 1154 (9thCir. 1998). A decision regarding qualified immunity is reviewed de novo. Romero v. Kitsap County, 931 F. 2d 624, 627 (9th Cir. 1991). While the plaintiff bears the burden of proof regarding whether the right is clearly established, a defendant must prove his or her conduct was reasonable."

"For purposes of determining qualified immunity, the law must be clearly established at the time of the defendant's acts." And...

"requires more than an alleged violation of extremely abstract rights" Tribble v. Gardner, 860 F. 2d 321, 324 (9thCir. 2000) (citations omitted)" (From Diruzza v. County of Tahama)

As pointed out above, Chapters 4 & 5, Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition apply,

and staying of Wyss's deprivation was a matter of city code, which must be followed, if "qualified immunity" should apply under the circumstances.

The building official illegally enforced her own order while the statutorily assured hearing was pending, as evidenced by the city official's letter of October 22nd, 1999 to Grays Harbor P.U.D. calling for power disconnection

> Monroe v. Pape, 365 U.S. 167, (1961): "The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did"

Hoquiam's standardless, arbitrary and selective methods to designate and abate violated petitioner's rights without warrant, or authority of law.

Wyss's protected rights were ignored under 1997 Uniform Code for the Abatement of Dangerous Buildings. The City of Hoquiam and others are subject to all of Wyss's 42 U.S.C.A. § 1983 damages claims.

**Conclusion:**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN R WYSS,
Petitioner/homeowner

DATE October 10, 2004

John R. Wyss
23005 107th Pl. W.
Edmonds, WA 98020
(206) 469-0777